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COMPARISON OF HANDWRITING IN FEDERAL COURT BY THE TRIER OF FACT

by

Marcel B. Matley

ABSTRACT: In Federal Court the jury, or judge in a bench trial, may make a handwriting comparison even if no witness has testified about handwriting identification. A survey of some cases is given to illustrate that the trier of fact may make such a comparison during deliberations, after presentation of evidence by both parties is closed.

KEY WORDS: Case law; Jury comparison of handwriting; Judge comparison of handwriting.

INTRODUCTION: Among the States, some have rules that a jury, or judge acting as trier of fact, may not make a comparison of handwriting unless a witness has testified on the matter. For example, see item 15, *Clark v State*. However, the question arose recently in a Federal case whether the judge in a bench trial could do so. In researching relevant cases back to the 1800s, it was found that there need not be a witness as to handwriting for the trier of fact to make a comparison of handwriting. Even criminal cases were found in which conviction was based on the trier of fact making a comparison of handwriting without the aid of a witness as to handwriting, whether a lay or expert witness.

In fact, the trier of fact makes the comparison during deliberations, in privacy, in chambers or the jury room, away from the parties' opportunity to cross-examine what seems to constitute ex parte expert evidence in a Star Chamber setting. In all the Federal cases discussed it was ruled that the trier of fact properly made a comparison. There was no indication as to what guided the trial court in deciding whether the exemplars were appropriate either as to quality or quantity. The exception is *Hickory v U.S.*, item 7. In most cases the reports do not indicate what were the observations or reasoning upon which the opinion of the trier of fact was based. An exception to this is *Hardy et al. v Harbin et al.*, item 3.

The Court Cases in Chronological Order:

1. *Luco v U.S.*, 23 How 515, 16 L Ed 545 (1860). The plaintiffs in this case claimed ownership of a large land grant in California, a grant allegedly given under the former Mexican rule. The court noticed the lack of credibility in some of the testimony and witnesses. For example, an old man purportedly parted with the valuable land grant for a comparatively paltry sum. Also, it was about twenty years after Mexican rule had ended that the claim was finally brought forth.

For our interests, the important feature is that the appeals court properly made its own comparison of handwriting and finding of fact on the question of forgery. At 550, the appeals court said: "We have ourselves been able to compare these signatures by means of photographic copies, and fully concur (from evidence 'oculis subjecta fidelibus') that the seal and the signatures of Pico on this instrument are forgeries...." "Oculis subjecta fidelibus" is Latin which literally translates as "subjects of believable eyes." Colloquially it can be translated as "seeing is believing," or "we saw it for ourselves."

2. *Medway v U.S.*, 6 Ct Cl 421 (1870). A British lady living in the South during the Civil War maintained that she gave no aid to the rebels. Partly on that basis she claimed property confiscated by federal agents as being her own. After the Civil War there was a law which said that anything which belonged to the Confederate Government was property of the United States and could be confiscated. Anyone wanting to claim confiscated property as being personal and not Confederate Government property, had to bring suit.

Having given aid and comfort to the Confederate Government or not was a factor in deciding whether the claim should be granted. Mrs. Medway had assisted Union soldiers in making their way back to Union lines. After the War, she had to move to the Midwest because her neighbors resented that and other pro-Union acts by her. To counter evidence of this, the Federal attorney brought forth a letter from Confederate archives, signed with her name to President Davis, which purportedly showed she had given aid and comfort to the Confederacy.

Not denying Mrs. Medway's good deeds for the Union, the defendant Government asked the court to compare the signature on the letter with her signature on her original petition to the Court of Claims. The Court found the signature on the letter to be genuine and admitted it into evidence.

In the reported decision, the Court reviews the history of handwriting comparison. Common law permitted the trier of fact to make comparison of the admitted or proven writings, which were already in the case for another reason, with writing which the person denied. No other comparison was permitted by common law.

The dissenting opinion argues against court comparison of writings because, among other reasons, it gives expert evidence without being subject to examination. The dissenting opinion concludes at 447: "If the United States is not willing to be tried by the same rules of law that are applied between man and man, this court had better be abolished." However, as we will see, precisely that rule on comparison of handwriting by the trier of fact even today remains the rule of law applying between individuals.

3. *Hardy et al. v Harbin et al.*, 154 US 598, 22 L Ed 378, 14 S Ct 1172 (Cir CA 1874). At 381 we read about an 1843 prayer for a Mexican grant of a ranch in California. The writing was compared to a writing made in Canada in 1831, the comparison being made in 1864. The Court said: "Hardy was a mechanic, not much accustomed to writing while at home, and his signature to the note is of that stiff, unpracticed character common to the signatures of such men. Although the letters proving the signature of Thomas M. Hardy are, in many instances, like those in the signature of John Hardy, the signature is in its general appearance more easy and flowing than that of John Hardy."

The Supreme Court in effect described the comparison it made of the handwriting. The Court's description of the typical writing of a mechanic who writes rarely is astute. Reference was made to what we would call class characteristics and to the degree of writing skill.

4. *Blewett v U.S.*, 10 Ct Cl 235; affirmed, 13 Ct Cl 556 (1874). The Court of Claims sitting as a jury may make handwriting comparison with or without the aid of an expert.

5. *Moore v U.S.*, 91 US 270, 23 L Ed 346 (1875). Headnote 1: "The Court of Claims, like a court of equity, may determine the genuineness of a signature by comparing it with other handwriting of the party."

6. *Williams v Conger et al.*, 125 US 397, 8 Sup Ct 933, 31 L Ed 786, Corpus Juris 22, 783 (Cir N.D. TX 1888). Only the jury can make a comparison of handwriting, and it may be asked to pass on the genuineness of the exemplars. Handwriting samples on documents in evidence in the case may be used by the jury as exemplars.

7. *Hickory v U.S.*, 151 US 303, 14 Sup Ct 334, 38 L Ed 170 (W Dis AR 1894). Reversed and remanded on grounds other than rulings concerning handwriting. The trier of fact may make a comparison of handwriting without the aid of experts. Handwriting samples on documents in evidence in the case may be used by the jury as exemplars. But the handwriting exemplar must

be the person's usual, natural style to show the general character of his writing, otherwise it is not satisfactory as a standard.

8. *Bowers v U.S.*, 244 F 641 (9 Cir CA 1917). The jury may make a handwriting comparison.

9. *Smythe v Inhabitants of New Providence Tp., Union County, N. J.*, 263 F 481 (3 Cir NJ 1920). Predecessor statute extended the common law rule in regard to comparison of writings. Thus, the jury properly compared the purported signatures of commissioners on bonds with their signatures which appeared on their oaths of office, which had been admitted into evidence.

10. *Easterday v U.S.*, 53 Ap DC 387, 292 F 664 (1923), cert denied 263 US 719, 68 L Ed 523, 44 S Ct 181. It was not error to permit the jury to make a handwriting comparison, since a statute permits the trier of fact to do so.

11. *Citizens' Bank & Trust Co. of Middlesboro v Allen*, 43 F2 549 (4 Cir VA 1930). It was not error to exhibit to the jury the defendant's signatures written while on the witness stand. At page 551: "The second question, raised by proper exception and assignment, is to the action of the trial court, after Mrs. Allen had written her name at the request and in the presence of the court and counsel rapidly a number of times with a number of different pen points, and afterwards in her usual regular, and undisturbed way of writing, and again in the presence of the jury a number of times, in permitting the paper on which her signatures thus appeared to be exhibited to the jury for comparison." The court rejected the assignment, thus upholding the action of the trial court.

12. *Goins v U.S.*, 99 F2 147 (4 Cir VA 1938); certiorari granted, 59 S Ct 461, 306 US 623, 83 L Ed 1028; certiorari dismissed, 59 S Ct 783, 306 US 622, 83 L Ed 1027. The trier of fact may make a comparison of handwriting.

13. *Bowles v Kennemore*, 139 F2 541 (4 Cir 1944). The trier of fact is permitted to make a handwriting comparison between writings which the purported writer has admitted are genuine and those writings which the purported writer has denied authoring.

14. *Williston v Heritage Supply Co.*, 155 A2 253 (Mun Ct Ap DC 1959). Disputed documents may be admitted without first proving them, since they were admitted as disputed and receiving them was necessary to proving them. The court or jury may compare the disputed signature for the purpose of determining its genuineness. If such comparison is the only proof offered, it may not satisfy the trier of facts; but, if it does, a finding based thereon cannot be said to be without substantial support. The court need not be aided by an expert.

15. *Clark v State*, 114 S2 197 (FL Ap 1959), 80 ALR2 261. This case is included because of the annotation in American Law Reports. The Florida Appeal Court gives a brief history of handwriting opinion testimony. At page 265 it states that the jury may only compare handwriting with the assistance of expert or competent lay witness testimony. Since the Florida statute required that opinion testimony be based on comparison of handwritings, the Appeal Court inferred that an expert is required. At page 268: "In short, it appears that although the question is one of first impression, our Supreme Court has indicated without exception that the comparison of handwritings is an art which can be judicially practiced only by expert or skilled witnesses."

The American Law Reports annotation, authored by H. C. Lind, is titled: "Propriety of jury, or court sitting as trier of fact, making a comparison of a disputed writing with a standard produced in court, without the aid of an expert witness." It includes references to Federal cases.

16. *U.S. v Cashio*, 420 F2 1132 (5 Cir LA 1969); cert. denied, 397 U.S. 1007, 90 Sup. Ct. 1234, 25 L Ed2 420 (1969). The jury may make a comparison of handwriting. There had been no proof by the prosecution of the genuineness of defendant's signatures on tax records. That was not grounds to grant a motion for acquittal. However, the defendant had testified that he had signed them, effectively abandoning his motion which was the basis of his complaint upon appeal.

By statute, there is a rebuttable presumption that tax records have been signed by the person whose name they bear. It was a prosecution for making false income tax returns.

17. *U.S. v Woodson*, 526 F2 550 (9 Cir CA 1975). Headnote 2: "In the absence of extreme or unusual circumstances, handwriting comparisons may be made by jurors and conclusions drawn from them, either in the presence or absence of expert opinion."

An expert could not say that Woodson had written the questioned writing, but it was proper for the jury to be instructed to make its own comparison and arrive at a conclusion.

18. *U.S. v Conley*, 4 MJ 327 (CMA 1978). Headnote 1 states that handwriting expert testimony was clearly admissible and constituted devastating proof.

The judge in the trial claimed training as a handwriting expert and considered his own opinion in rendering his verdict, but he did not take the stand as an expert witness. The conviction was reversed, since the judge should have disqualified himself.

The defendant's right to confront witnesses against him was eviscerated by the judge acting as a handwriting expert. However, we might well note that that is exactly what happens whenever any fact finder compares handwritings during deliberations and after presentation of evidence closes. The dissenting opinion begins at page 330 and asserts: "An accused has no constitutional or statutory right to an ignorant or inexperienced juror." The dissenter argued that, if the judge had had no training as an expert and had been completely incompetent to compare handwritings, the conviction would have been upheld. The appellant/defendant complained on the grounds that the judge was otherwise qualified to do what the law permitted him to do, qualified or not.

19. *U.S. v Alfred*, 10 MJ 170 (CMA 1981). A judge, in a non-jury trial, could make a comparison of handwriting and find the defendant guilty. See also *U.S. v Conley*, which is discussed above, where the same appeals court overturned the conviction since that judge confessed on the record that he could have qualified as an expert.

The military appeal court also noted that expert testimony would have been admissible, but it would not have been conclusive since the judge would have had to weigh the evidence anyway. Therefore, the defense argument that expert evidence should have been presented had no legal weight.

20. *U.S. v Clifford*, 543 FS 424, 10 Fed Rules Evi Serv 1424 (W.D. PA 1982); reversed on other grounds, 704 F2 86, 12 Fed Rules Evid Serv 870 (3 Cir PA 1983).

In the report given in 704 F2 86, headnote 4 reads: "Jury can compare known handwriting sample with another sample to determine if handwriting in latter sample is genuine."

Conclusion:

The trier of fact in many of the cases discussed used as few as one exemplar, something for which an expert opinion would be severely challenged. At times there were factors which might even have the expert evidence dismissed, such as a number

of years lapse between the dates of the disputed and exemplar writings without justification for why more recent exemplars were not used. These are just examples of the technical reasons which make jury or judge comparison of handwritings problematic, when there has been no expert comparison evidence presented at trial and no cross-examination available to the side against whose interest the opinion of the trier of fact goes.

There is a far more serious problem with the practice. It cannot be emphasized too much that if the trier of fact makes a comparison without benefit of lay or expert witness, there would be no cross-examination to shake assurance in the opinion, to impeach the skill to do so, or to challenge the bases for the opinion. On that factor alone, ought not the rule permitting such an examination, which takes place completely out of the presence of the parties, be corrected, since it is the creation, introduction, admission and acceptance of evidence without any of the checks and tests to which all other evidence is subjected?

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